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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 183.

RAFAEL RODRIGUEZ AND EURIPIDES RODRIGUEZ,
PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR PLAINTIFFS IN ERROR.

FRANCIS H. DEXTER,
FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for the Plaintiffs in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 1612

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STATEMENT OF CASE.

The plaintiff in error, Rafael Rodriguez, was formerly employed in the postal service of the United States as postmaster at Coamo, Porto Rico.

On January 14, 1903, a certain "bill of indictment" charging said Rafael and his brother Euripides with conspiring together "to steal, embezzle and purloin moneys of the United States" is stated by the record to have been pre-

sented to the trial court by "the grand jurors of the United States of America."

This "bill of indictment" contained two counts, the second of which is of no consequence here.

The overt act in furtherance of the alleged conspiracy charged by the first count of the "bill of indictment" was that said Rafael "feloniously did steal, embezzle and purloin divers bank notes and United States notes * * * together amounting to the sum of, and being of the value of, five hundred and sixty dollars, of the money and property of the said United States."

The defendants were arrested and gave bail for their appearance for trial.

On January 26, 1903, the case against them having been called for hearing, prior to their arraignment, they filed a motion to quash the panel of petit jurors for the then pending term on the ground, among others, that the jurors composing the same had not been selected and drawn in the manner prescribed by the governing statute (8).

Evidence concerning the matter of the motion having been heard, the motion was overruled (9).

Thereafter, on the same day, defendants were arraigned and pleaded "not guilty" (9).

Thereupon the marshal of the court was directed to summon from among the bystanders twenty men "to serve on the panel in the case" (9).

From the bystanders so summoned by the marshal eleven jurors were impaneled and sworn. It does not appear how F. H. Waters, the twelfth man on the trial panel, was secured.

The defendants do not appear to have interposed any

specific objection to the trial panel so chosen, and, evidence having been introduced by both parties, the case was submitted to the jury, who returned a verdict of guilty against both defendants "on the first count of this indictment" (10), and on the same day the court sentenced Rafael to be confined in the penitentiary of Porto Rico "for three years at hard labor," and Euripides to be similarly confined "for two years and pay to the United States of America a fine of five hundred dollars ($500) (10).

Thereafter the defendants, by their attorneys, filed a motion in arrest of judgment, basing such motion on the ground that the grand jury which found the indictment against them upon which they were tried and convicted "was not selected or drawn according to law but was drawn without regard to the prescription and requirements of the statute in such case made and provided."

The irregularities specified were:

a. That Ricardo Nadal, the clerk of the court, took no part in the selection of the names which were placed in the jury-box, but that the other jury commissioner of the court, after directing a deputy clerk of the said Nadal to prepare lists and tickets of persons, did place all the said lists and tickets with names in said box himself, and that from the tickets and names so placed in said box by said one commissioner the said jury was subsequently drawn. Said deputy clerk was not and is not a person authorized by law to take part in the selection, drawing, or otherwise designating the grand and petit juries of this court, and had not theretofore been appointed by the court for that purpose.

b. Said deputy clerk is not shown to have been of a differ-

ent political affiliation from Andres Crósas, the jury commissioner theretofore appointed by the court.

c. Said names were not placed in said box alternately by said Crósas, commissioner, and said Nadal, clerk (12–13).

This motion in arrest was sworn to by the defendant Rafael (13).

The motion, having been heard by the court, was overruled, which made the following finding with respect thereto:

"The ground of this motion is that the grand jury that found the indictment was not drawn or selected according to law.

"It appears the regular jury commissioner, Andres Crósas, and the deputy clerk, Frank Antosanti, acted in doing so, the clerk of the court being absent on sick leave. * * * There appears to have been some irregularities and not an exact compliance with the terms of the statute, but both the commissioner (Crósas) and the deputy clerk made the selection and both were present all the time during the selection, and no one else took part in it.

"It is not shown they were not of opposite politics, and this is to be presumed. There was no such irregularity as vitiated the panel, but a substantial compliance with the statute upon the subject" (14).

Defendants in their motion for a new trial assigned, among other errors, that of the trial court in overruling the motion to quash the panel of petit jurors, "for the reason that the said jury were not selected and impaneled as required by the law" (17), and also "in overruling and denying the motion heretofore made by these defendants to arrest the judgment heretofore rendered herein against them for the reasons set out in said motion that the grand jury which found the bill of indictment herein against them were not, as in said motion set out, drawn, selected and impaneled as

required by law and were not for that reason a lawfully constituted grand jury for said purpose" (18).

The motion for new trial was overruled, and the defendants, having sued out a writ of error from this court, assigned as errors for argument thereunder, among others, the two errors last above mentioned (82).

ARGUMENT.

THIS COURT IS POSSESSED OF JURISDICTION TO REVIEW ON WRIT OF ERROR THE PROCEEDINGS OF THE COURT BELOW.

By section 14 of the act of April 12, 1900, commonly called the Foraker act, it was declared—

"That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States." * * *

By section 35 of the same act it is further declared—

"That writs of error and appeals from the final decisions of the * * * district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied." * * *

The defendants were prosecuted by indictment. The offense with which they were charged was infamous. The crime alleged was against the United States and, contrary to the prohibitions of an United States statute, punishment

awarded them by final sentence was confinement in the penitentiary at hard labor.

In such a case a court of the United States could not proceed against the alleged wrongdoers save upon indictment by a legally qualified grand jury.

Section 800 of the Revised Statutes of the United States declares that—

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such State court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the State courts, from time to time in force in such State."

The Porto Rican statutes contain no provisions relating to the selection, drawing, or impaneling of grand jurors, and the United States district court for the district of Porto Rico has issued no rule or order on the subject.

By act of Congress of June 30, 1879 (21 Stats., 43), it is provided that jurors to serve in courts of the United States

"shall be publicly drawn from a box containing at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing residing in the district in which such court is held, and a well-known member of the principal political party in the

district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein, * * * and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith."

The foregoing acts of Congress were brought in question by the contention of the parties, and the right claimed under them was denied by the court. The accused claimed the right under such statutes not to be sentenced to penal servitude for an infamous offense unless first indicted by a grand jury designated and drawn in accordance with law. The deputy clerk of the court was not the clerk of the court. He had no legal authority to take part in the selection of grand juries. It mattered not that he acted in good faith and without prejudice or taint of fraud.

The postmaster or chief of police would have been as competent as he to perform such service. The plea of defendants in this regard was overruled by the court. It thus appears that the accused claimed a right under certain acts of Congress which was denied to him by the trial court. This court, therefore, has jurisdiction to inquire whether there is anything of substance in the claim.

Crowley *vs.* United States, 194 U. S., 461, 467.

MERITS.

THE GRAND JURY HAVING BEEN SELECTED BY A PERSON HAVING NO AUTHORITY WHATEVER TO SELECT THEM, THE WHOLE PROCEEDING OF FORMING THE PANEL WAS VOID. THE OBJECTION TO THE JURY WAS IN TIME.

In United States *vs.* Gale, 109 U. S., 65, it was held that the proper mode of taking objection to the *personnel* of the grand jury, when the matter complained of does not appear of record, is by plea in abatement, and that pleading "not guilty" without having first either challenged or moved to quash or pleaded in abatement, would be deemed a waiver of all irregularity in the composition of the grand jury; but in the same case it was also said:

"There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void, as where the jury is not a jury of the court or term in which the indictment is found; *or has been selected by persons having no authority whatever to select them;* or where they have not been sworn; or where some other fundamental requisite has not been complied with."

To the same effect are:

Sanders *vs.* The State, 55 Alabama, 186.
Miller *vs.* The State, 33 Mississippi, 357.
Curtis *vs.* Commonwealth, 87 Virginia, 590.
Yelm Jim *vs.* Territory, 1 Washington Ty., 63.

The conclusion in the Crowley case (*ubi supra*) is not opposed to this. There the case was made to turn on the sug-

gested incompetency of certain individual members of the grand jury—that is, upon the *personnel*—and it was held that the objection was properly taken by plea in abatement. In the case at bar the objection is fundamental in character, and asserts that the entire proceeding looking to the formation of the panel was without authority of law, and the result attained, viz., the panel itself, was void. A grand jury so selected was without power to return a valid indictment, and in the absence of a valid indictment the trial and conviction of defendants was unconstitutional and void.

As this objection is fundamental in character and lies at the threshold of the case, it seems to be unnecessary to discuss the many other errors which occurred in the course of the trial and which have been duly preserved in the record.

It is respectfully submitted that the sentence of the lower court should be set aside and the accused persons set at large or otherwise dealt with as the law may prescribe.

FRANCIS H. DEXTER,
FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for the Plaintiffs in Error.

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